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IN THE

Supreme Court of the United States

October Term, 1963.

No. 481.

VIKING THEATRE CORPORATION,
Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS STANLEY COMPANY OF AMERICA AND STANLEY WARNER MANAGEMENT CORPORATION.

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OPINION BELOW.

The opinion of the Court of Appeals (R. 2766-92) is reported at 320 F. 2d 285.

JURISDICTION.

The jurisdiction of this Court is adequately set forth in petitioner's Brief.

QUESTIONS PRESENTED.

1. Whether the Sherman Act is violated by arrangements between two of the eight exhibitors in a market respectively to refrain from seeking to license particular groups of pictures, when these arrangements are agreeable to the distributors of the pictures and no other exhibitor is thereby impeded in the attempt to license them.

2. Whether petitioner has standing to complain of these arrangements without demonstrating any adverse impact on its own competitive efforts.

STATUTES INVOLVED.

Section 1 of the Sherman Act, c. 647, 26 Stat. 209, 15 U. S. C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 4 of the Clayton Act, c. 323, 38 Stat. 731, 15 U. S. C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE.

This is an appeal by Viking Theatre Corporation ("Viking"), Petitioner, from the unanimous judgment of the United States Court of Appeals for the Third Circuit (Biggs, Chief Judge, Ganey and Smith, Circuit Judges) affirming the judgment of the United States District Court for the Eastern District of Pennsylvania (John W. Lord, Jr., District Judge) directing a verdict for the defendants after two months of trial at the close of Viking's case. This Court granted certiorari.

The Complaint.

On November 13, 1956, Viking, lessee and operator of a first-run moving picture house in central Philadelphia, brought an action against eight major distributors of motion pictures and three (out of seven) other exhibitors showing first-run pictures in central Philadelphia.

Viking claimed damages in excess of $600,000 which it asked to have trebled, on the allegation that it had been damaged in this amount by reason of a conspiracy effective from July 2, 1954, when Viking Theatre opened, until November 13, 1956, the date that the action was commenced. The conspiracy was described as a conspiracy among these distributors and exhibitors in restraint of trade,

> ". . . to harass the plaintiff and to impede the plaintiff's ability to compete with the first-run central city Philadelphia theatres operated by the defendant exhibitors, with the ultimate objective of putting plaintiff out of business as a motion picture exhibitor and as a competitor of the defendant exhibitors."

pursuant to which

> ". . . the defendant distributors with the knowledge and acquiescence of the defendant exhibitors and in conspiracy with them and for the benefit of the exhibitors have performed . . ."

certain discriminatory practices (R. 7-8).

The Parties Respondent.

As has been said, the defendants included eight distributors. The trial judge directed a verdict in favor of RKO Teleradio Pictures, Inc. (RKO) (R. 1987) before the end of the trial, and Viking has not appealed, thus acquiescing in the verdict in favor of RKO, although in its complaint Viking accused RKO of just the same illegal acts as it alleged against the other defendants.

Of the seven central city operators of first-run houses in central Philadelphia the three who were sued as conspirators were (a) Fox Philadelphia Building, Inc., which operated one house, Fox Theatre, (b) William Goldman Theatres, Inc. ("Goldman") which operated three houses, and (c) Stanley Warner Management Corporation and Stanley Company of America, which for all the purposes of this case were and should be treated as a unit ("Stanley Warner"), which operated three houses.

Position of Stanley Warner.

This Brief is filed on behalf of Stanley Warner, and we shall limit our discussion largely to the charges and evidence applicable to it.

It is important that attention be focused on Stanley Warner, for from beginning to end Viking has adopted a monolithic attitude toward the three exhibitor respond-

ents, as it has toward the seven distributor respondents, using the terms "exhibitor respondents" and "distributor respondents" as if all exhibitors and all distributors acted with the slavish uniformity of a company of Prussian soldiers.

By a method of false induction each act of *every* respondent, however isolated and peculiar to it, is treated as merely illustrative of identical *unproven* acts of *all the other* respondents.

In fact, the evidence as to each respondent shows such entirely different conduct that the effort of Viking to find a common denominator completely fails when their actions as reflected in the evidence are looked at separately.

Petitioner's technique serves particularly to distort the posture of Stanley Warner in this case. Except for references to participation in splits (which participation Stanley Warner freely concedes), petitioner normally avoids specific reference to Stanley Warner and instead offers "illustrations" in terms of *Goldman* activities, or simply makes statements about "monopolists" or "respondent exhibitors," and cites evidence relating to *Goldman*.

Thus, at page 17, petitioner wrenches out of context a statement by a Goldman employee about one of Goldman's theatres and offers it as "Typical of the attitude of the respondent exhibitors" with respect to their playing-time commitments. We are then told that breaches of playing-time provisions were committed "often over the objection of the distributor," and are cited to the evidence with respect to *one Goldman picture*. Ultimately, at pages 37-38, petitioner states, without any type of direct or implicit limitation: "The respondent exhibitors further used their dominant market position to extract numerous rental and

playing-time adjustments, often over the distributor's objections."[1]

Petitioner is driven to such tactics, not only for its effort to reverse the directed verdict in favor of Stanley Warner, but to present a case again *any* respondent—since its theory now is that unfair advantages flowed automatically from splits.

Especially is this true under Viking's new theory that the relevant yardstick of market power is seating capacity. Stanley Warner had more than twice as much seating capacity as its bitterest rival, Goldman (petitioner's Brief, p. 14), and hence on Viking's theory should have turned out to be much the biggest villain in the cast of respondents. Thus, Stanley Warner's acquittal makes a shambles of Viking's entire case.

Era Before Viking Entered Central Philadelphia.

In the early days of motion pictures Stanley Warner was the pioneer exhibitor in Philadelphia, and by 1940 it operated all seven of the first-run houses in central Philadelphia. At about that time William Goldman came into the territory and after his terrific victory over Stanley Warner's predecessor in *Goldman v. Loew's, Inc.*, 150 F. 2d 738 (3d Cir. 1945), Goldman expanded, Stanley Warner contracted, and additional competitors entered the field. When the Fabian interests, headed by Simon Fabian, bought control of Stanley Warner, March 1, 1953, Stanley Warner was operating only 4 of the 11 first-run houses in

1. In fact, there is not a scrap of evidence in the record with respect to Stanley Warner compelling any distributor to submit to anything. All Viking's statements as to Stanley Warner playing-time adjustments are "supported" by one week adjustments on two Universal pictures in which Viking was not interested (petitioner's Brief, p. 19, R. 2603-2604, 28-29). Viking itself did not seek playing-time adjustments from Universal. It asked and did receive several from MGM (R. 479-488).

central Philadelphia (petitioner's Brief, p. 5). Television had had a tremendous effect upon the people who were seeking entertainment, and the producers of motion pictures had reduced the number of suitable pictures available to central city theatres, to a point where Fabian could not supply even his four houses with product of the quality that they needed to be profitable.

As he testified:

> ". . . we determined we just had too many theatres under our management in Philadelphia and that we could not get enough pictures to supply them all, and that we would dispose of several theatres, at least starting with one." (R. 66)

One of the four Stanley Warner theatres was a house with about 1,000 seats, at the southeast corner of 19th and Chestnut Streets, which Stanley Warner had owned and operated for many years as the Aldine. It was the smallest of the four Stanley Warner houses, less favorably located than at least two others, and the least favored by the distributors (R. 94-95). It was losing money (R. 124). It lacked air-conditioning, but that was the most easily curable of its troubles. As was testified by Ted Minsky of Stanley Warner:

> ". . . if air-conditioning was the only problem our company officials would naturally have put air-conditioning in. . . ." (R. 1595)

Fabian therefore decided that it would be in the best interests of Stanley Warner to give up the Aldine in order to be able better to secure satisfactory product for his other three houses, the Mastbaum, Stanley and Stanton. This decision was made entirely by Fabian, without agreement or consultation with any distributor or any other exhibitor (R. 95).

Obviously, Mr. Fabian's purpose of obtaining product for his other houses would be defeated if the Aldine was sold to anyone who would operate it as a first-run theatre.

And so, to quote from Viking's Brief in the Court of Appeals (p. 6):

> "Fabian decided to dispose of it, but only if the purchaser would not use the building as a theatre; he so instructed Stanley Warner's real estate broker, Albert M. Greenfield & Co. N. T. 300, 301. As Fabian put it, he wanted 'to eliminate it [The Aldine] as a theatre'. N. T. 317."

Sale of Aldine.

Harry Sley was a client of Albert M. Greenfield & Company, the real estate agent engaged by Stanley Warner to sell the Aldine (R. 1496). Sley was in the automobile garage and parking lot business. His only connection with the motion picture industry was that he operated a neighborhood house in West Philadelphia which showed pictures on subsequent runs (R. 1497). The Greenfield office got in touch with Sley. Sley gave Greenfield "definite assurance" that if he bought the property *he would not use it as a theatre but would convert it into a garage* (R. 74, 104). In confirmation of this he applied for a mortgage on the building describing its use as a parking garage (R. 104). Greenfield therefore assured Fabian that the property was not to be used as a theatre, and Fabian then agreed to sell the Aldine to Sley (R. 74).

As soon as Sley made settlement for the property in September 1953, he proceeded to improve it and advertised his intention to operate it as a first-run theatre. He named it the "Viking". When Fabian found that he had been deceived, he complained to Greenfield. When Greenfield confronted Sley with his previous statements, Sley merely said:

> "I have the right to *change my mind*. I admit that I gave you that assurance, but I have a right to change my mind and I have changed it and I intend to make it a theatre." (R. 104) (emphasis supplied.)

But when Sley was examined later at the trial, he was asked:

> "Now *at the time that you acquired the property* then known as the Aldine Theatre, what did you intend to use it for?" (Emphasis supplied.)

He answered:

> "*For a theatre.*" (R. 1496-7) (Emphasis supplied.)

Fabian tried to buy the property back from Sley, but nothing came of the negotiations.

It was in this manner that Sley brought his Trojan horse to 19th and Chestnut Streets, and entered upon his career as a first-run theatre operator in the already starved first-run Philadelphia market.

Viking's Success in Getting Pictures.

Sley opened the Viking July 2, 1954. From a reading of petitioner's Brief one can almost envision Sley as the target for the arrows of all the distributors and exhibitors in central Philadelphia, and one would have thought that his theatre would have been shot down at birth. That is not what happened.

In spite of the fact that Fabian had given up the Aldine because with all *his* skill and experience *he* was not able to get enough good product for it, from the day that Sley opened until the date he began this action, November 13, 1956, he succeeded in buying first-run pictures from the

same distributors which he is suing for conspiracy to ruin him.

The history of his dealings with the distributors appears in their Brief.

The Splits.

Before Sley acquired the Aldine Theatre, Stanley Warner and Goldman, with the consent of various distributors, had entered into splitting agreements with respect to the product of these distributors.

The existence of splits, by the time the Petition for Certiorari was filed, became, according to Viking, one of the "Reasons For Granting The Writ" (p. 21), on the allegation that they constituted "a classic division of markets agreement" (Petitioner's Brief, p. 33).

It is necessary to correct this false image by showing what the Stanley Warner-Goldman splits *involved in this case* were—or rather what they were not. Viking attempts to create the illusion that the splits conferred monopoly power on the participants. This attempt is in fact as shallow and hollow as the houses the old moving picture producers used to put on the lot when they wanted to show the main street of a western town—all front and no rear. The splits had no more to do with what pictures Viking got or did not get than if they had been agreements between exhibitors in Zanzibar.

All that is necessary to confirm this is to analyze the history and operation of the splits.

The splits were loose, informal arrangements, consented to by the affected distributors, whereby Stanley Warner refrained from bidding for some part of the distributor's product and Goldman refrained from bidding

for another (presumably equal) part of the same distributor's product. They were effective only as between Stanley Warner and Goldman. *Any other exhibitor could compete for all pictures just as if there were no splits* (R. 112, 113, 115, 125), but with the *added advantage* of not having to compete for any picture against *both* Stanley Warner and Goldman—only against *one* or the *other* of them. Splits did not apply to all pictures and could last only so long as all the parties, including the distributors affected, remained willing (R. 100-103, 107, 111-115, 125).

The first split had been instituted in central Philadelphia in 1951 by Loew's, in view of Goldman's objection to competitive bidding. Stanley Warner was not consulted about the action of Loew's and Goldman, and objected, but finally acquiesced (R. 128, 1634, 1638).

Subsequently, but *prior to the time that Stanley Warner sold the Aldine* or Sley was thought of as a central city exhibitor, other distributors, at varying times also consented to splits of *their* pictures (R. 2355, 2358, 2361, 2363, 2369, 2370, 2374).

The explicit statement in Viking's Brief in the Court of Appeals that:

> "There can be no question that Viking was the actual and intended victim of the conspiracy" (p. 55),

deliberately ignores the fact, stated by Viking itself, that the splits were in existence *before Sley* ever was thought of as a customer for first-run pictures in central Philadelphia.

20th Century-Fox never was a party to any split nor was the Fox Theatre (R. 87-89). Fox Theatre continued its tradition of showing 20th Century-Fox product, and Stanley Warner and Goldman as a matter of common sense

preferred not to seek 20th Century-Fox product because if they had acquired the pictures of that distributor the Fox Theatre would have had to try to secure the product of other distributors (R. 129). Viking, however, bought eight 20th Century-Fox pictures (R. 838).

Of course, the splitting arrangements did not *ipso facto* or *per se* assure the license of any picture to Stanley Warner or to Goldman. All the splits did was to give one of them the opportunity to seek the picture *in competition with any exhibitor who wanted the picture*, except the other party to the split.

The Split Insured No Pictures to Stanley Warner and Took None From Viking.

Just a few quotations from the testimony as to the effect of the splits on Sley.

Mr. Fabian testified:

"There is no question that just the same as we not having to bid against the three Goldman theatres, in the same way any other exhibitor who desired a picture on our split did not have to bid against the Goldman theatres either, and the same thing happened in the case of a picture that was on the Goldman split, these other exhibitors would not have to bid against the Stanley Warner theatres. So that *they had a distinct advantage in having eliminated on either split three important theatres to bid against.*" (Emphasis supplied.) (R. 100)

Mr. Goldman testified:

"Q. Now, from your experience what is the effect upon an exhibitor like the Viking which results from a split such as has been described here between Goldman's Theatres and Stanley Warner's Theatres?

* * *

> A. . . . In the instance of a split, as you just described, I do foreclose myself against one-half of the product, while Mr. Sley has access to 100% of the product.
>
> Q. Does that, therefore, represent an advantage or disadvantage?
>
> A. *A tremendous advantage to him, sir.*" (Emphasis supplied.) (R. 1734-1735)

Far from challenging this testimony at trial, neither Mr. Sley nor Mr. Wren (his general manager) offered a word of testimony about any injurious effects of the splits.

The Court of Appeals in its opinion summed up the effect of the splits as follows (R. 2776):

> "The evidence shows that the agreement between Stanley Warner and Goldman imposed no obligation on the distributors to include particular pictures on the list or to deal exclusively with the said exhibitors. The evidence affirmatively shows that *every exhibitor was afforded the opportunity to bid or negotiate for the pictures of each distributor;* in fact, many of the pictures listed on the split were licensed to non-defendant first-run theatres, including the plaintiff. It was further shown that the agreement imposed no obligation on the defendant exhibitors to bid or negotiate for the pictures on their respective sides of the split." (Emphasis supplied.)

We challenge Viking to point out a single disadvantage it suffered as a result of the splits in getting pictures for which Viking and Stanley Warner competed.

Undoubtedly because Sley realized that he was not being hurt by the splits, he never asked to become a party to them (R. 105) and indeed said that he was not interested in becoming a party (R. 1924). He never complained to

Stanley Warner about any problem in connection with getting pictures, and Stanley Warner never knew until the *service of the summons in this case* that Sley claimed that he had any ground for complaint against Stanley Warner (R. 105).

Pictures Viking Sought.

During the period in suit, July 2, 1954 to November 13, 1956, there were played by Viking and the respondent exhibitors 468 first-run pictures (R. 2160). Viking's access to these 468 pictures was totally different from that of Continental Ore Company to its sources of supply, as shown in its case against Union Carbide and Carbon Corporation, 370 U. S. 690 (1962), so copiously quoted by Viking. In that case this Court reversed the Court of Appeals for according no weight to Continental's evidence that the respondents there had interfered with, acquired or destroyed the several sources of vanadium oxide relied on by Continental to supply its needs (p. 699).

In the present case Sley's opportunity to seek whichever of the 468 pictures he wanted *was not impeded in the slightest degree*. He knew from published reports and from the distributors just when each of their pictures was planned to be released, and he was free to go after any picture he wanted. This Viking does not deny. As Wren himself said, he was at liberty to seek or not to seek any pictures he wanted to (R. 903):

> "Q. You also acknowledge, do you not, that the Viking Theatre Corporation, of which you are now the vice president, can take or lease the motion pictures produced by any of the distributor-defendants in this case; right?
>
> A. I don't understand what you mean by 'take or leave.' You mean we can bid for them or not bid for

them; we can make—negotiate for them or not negotiate for them?

Q. That is right.

A. Yes, sir."

The pictures, of course, belonged to the distributors, and Stanley Warner was not consulted and had no voice in what awards the distributors made to Viking or the terms of those awards or any modifications of those awards. These were matters exclusively between Viking and the distributors.

1. Of These 468 Pictures played by Viking and all the respondent exhibitors during the period in suit *Viking sought only 87* (R. 28-29, 350, 647, 741, 773, 2644-2648). It selected these particular 87 pictures and passed up all the other 381 purely as a matter of its choice, and presumably pursuant to its policy of running its theatre.

A summary of where these pictures played is as follows:

	Sought by	*Played By:*			
Distributor	*Viking*	*Viking*	*Stanley Warner*	*Goldman*	*Fox and Others*
Paramount	13	2	3	7	1
Warner Bros.	10	1	5	4	0
20th Century-Fox	16	8	1	0	7
RKO	2	0	1	1	0
Columbia	4	1	1	2	0
United Artists	17	11	2	3	1
MGM	19	10	2	2	5
Universal	6	4	2	0	0
	87	37	17	19	14=87

As appears from this summary, Sley did very well with the 87 pictures that he sought. He got 37 for the Viking while Stanley Warner got less than six per theatre. Sley got more than Stanley Warner and Goldman together for their *six* houses.

2. Of These 87 Pictures which Viking sought, *Stanley Warner also sought 33* for its three houses. Stanley Warner had nothing to do with the *other 54* of the 87, some of which Viking got and the rest of which went to other exhibitors.

3. Of the 33 Pictures which *Viking and Stanley Warner both sought*, Stanley Warner got *17*, an average of less than *six* per theatre. Of the other *16* pictures Viking got *six*, Goldman six,[2] and the Arcadia five (R. 1616-1625).

As far as Stanley Warner is concerned, it *did not get any of these 16 pictures*, and if Viking has any complaints concerning the 16 they certainly cannot be complaints against Stanley Warner.

4. *If in the award of the 17 pictures which Stanley Warner licensed in competition with Viking* there was not some recognizable indication of conspiratorial treatment by the distributors, some red flag of unmistakable hostility to Viking and favor to Stanley Warner so that a reasonable man could detect a pattern of common intent of the distributors to harm Viking for the benefit of Stanley Warner, then the case is barren of evidence of probative value against Stanley Warner and the complaint properly was dismissed as to it.

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2. Since the splits did not deal with *all* product Stanley Warner did, on occasion, find itself competing with Goldman. At one point in the trial Wren found himself in the embarrassing positon of attacking an award to *Goldman* and then acknowledging that *Stanley Warner's bid was better than Viking's*, so that it was *Stanley Warner* who was "wrongfully deprived" of the picture by its alleged co-conspirator (R. 1213-1214).

To prove design or system (2 *Wigmore* (3d ed. 1940, p. 202)):

> "The added element then must be not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*" (Emphasis supplied.)

In the trial court and in the Court of Appeals Viking did claim evidence of such a conspiratorial pattern. Its principal argument was that

> "The defendant distributors allocated films to the defendant exhibitors pursuant to the split by (a) *rejecting superior Viking bids*. . . ." (Brief in Court of Appeals, p. 36) (Emphasis supplied.)

The Brief went on to say,

> ". . . Viking bids offering terms *superior* to those proposed by the defendant exhibitors were *routinely* rejected in favor of the defendant exhibitors. . . ." (Emphasis supplied.)

The Court of Appeals analyzed the evidence meticulously and concluded (R. 2783):

> "Because of the unsubstantial nature of the comparison technique employed and the equivocal results obtained by the application of that technique, we are of the opinion that it would be impermissible to allow a jury to draw the inference that the *rejection of the plaintiff's bids resulted from an intent to discriminate*. A jury is permitted to draw only those inferences of which the evidence is *reasonably susceptible*, and may not be permitted to resort to *speculation*. Therefore, we hold that the evidence was insufficient to support

> the claim that the distributors rejected superior bids of the plaintiff in furtherance of a common plan." (emphasis supplied.)

Petitioner does not here challenge the correctness of this ruling and *has not even mentioned this matter of the rejection of alleged superior bids of Viking.*

It therefore may be assumed that Viking no longer charges that the distributors wrongfully awarded to Stanley Warner the 17 pictures we have referred to—*the only ones which both Viking and Stanley Warner sought.*

With nothing left of its charge of a discriminatory pattern of rejection of superior Viking bids, petitioner has abandoned its claim of a conspiracy to be inferred from circumstantial evidence of licensing practices. Its entire case for the existence of a conspiracy now rests on the splits. The additional complaints of discrimination are submitted by petitioner merely as evidence of the *effect* of the splits, and if the splits do not prove the *conspiracy*, its *effects* can not do so.

> "For the conspiracy in this case was complete when the split system was instituted. The discriminatory practices are merely illustrative of the illegal effects the conspiracy had on the market." (Petitioner's Brief, p. 28)

We proceed, nevertheless, to deal with these alleged discriminations as they relate to Stanley Warner.

Film Rental Adjustments.

Petitioner does not pretend that there was any difference—much less any discrimination—with respect to *adjustments* granted on the pictures in which both it and Stanley Warner were interested.

Yet it is only with respect to *such pictures* that Viking could conceivably have any legitimate complaint. Adjustments granted to Stanley Warner with respect to the kind of picture Viking *did not want* have no more relevance to the case than the licensing of pictures to Stanley Warner in other cities, or by non-defendant distributors.

Viking's approach—an analysis based on pictures with which it had no concern until it started suit—comes down to the proposition that no distributor could give adjustments to Stanley Warner or Goldman , or any reason, without being prepared to give adjustments of *similar* amounts on *other* pictures to all possible *future* customers, lest it be accused of conspiring to injure those possible future customers.

Viking did not even attempt to prove that any Stanley Warner adjustment had been *granted* under circumstances similar to those under which a Viking adjustment had been *sought and denied*, and that the action of the distributor therefore reflected some fundamental difference in its approach to the two exhibitors. Indeed with one exception, adverted to shortly, Viking made no effort to show a difference in the grant of adjustments to Stanley Warner by any particular distributor.[3]

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3. Petitioner charges (p. 48) that the Court of Appeals was "arbitrary" in considering this point, and implies that "in context" petitioner's offer of proof should have been deemed to include a distributor-by-distributor breakdown. But the "context" was precisely that of an offer to show *lumped totals* just like those contained in other evidence offered by petitioner (R. 1040-1052, 2067). It is remarkable that petitioner should in one part of its Brief place such heavy reliance on *undifferentiated totals* as to adjustments and the film rentals that reflect them (pp. 16-17, 26-27), and then later argue that the Court of Appeals should have assumed it meant to deal with the position of the *individual distributors* as such. When petitioner thought (mistakenly, as we show *infra*) that it could help its case with an analysis of the adjustment policy of a particular distributor, Universal, it offered a *separate chart* (R. 2603-2605).

Instead, all that Viking submitted was an amorphous offer of proof in which totals of adjustments were lumped without regard to whether Viking was interested in the pictures—or even in the same type of pictures—without regard to the circumstances of the adjustments or what prompted them, and without regard to which distributors granted them. Thus a claim of "discrimination" is attempted by comparing, for example, the refusal of adjustments to Viking by 20th Century-Fox, which licensed virtually no product to Stanley Warner, with the grant of adjustments to Stanley Warner by Columbia, from whose product Viking normally remained aloof.[4] The bulk of Viking's pictures came from three distributors—MGM, United Artists, and 20th Century-Fox. Petitioner offered nothing to show under what circumstances, if any, Stanley Warner was able to get adjustments from any of these companies.

With respect to only one distributor, Universal, did Viking attempt anything approaching a refined analysis (R. 2603-04). In this case, petitioner recognized at least some obligation to distinguish among pictures, and eliminated all which had grossed less than $19,000. The chart shows a total of $16,866.90 allowed to Stanley Warner for a total of three pictures. This compares with a total of $15,000 offered by Universal to the Viking as adjustments on four pictures (R. 500). We do not claim that this striking similarity represents some conscious effort on the part of Universal to maintain parity between exhibitors. Obviously, adjustments are negotiated with an exhibitor on the merits of the *particular circumstances of the exhibition of the picture involved*. Statistically, one would expect wide variations in totals. The similarity in

4. As we pointed out *supra* at pages 11-12, Stanley Warner adopted a policy of not seeking 20th Century-Fox product. Viking, on the other hand, submitted offers for only 4 of the 70 Columbia pictures and licensed 1 (R. 349-350, 1508-1509).

total adjustments granted Stanley Warner and Viking by Universal is simply a vivid illustration of the futility of a cry of "discrimination" based on undifferentiated figures.

Petitioner's footnote effort (p. 19) to explain away as an "illusion" the similarity of the Universal adjustments is itself the best demonstration of the fundamental points involved[5]: (1) the absurdity of the premise to which petitioner has been driven: that any discrepancy amounts to some kind of "discrimination"; (2) the uselessness of the raw totals which petitioner submitted with respect to the distributors as a whole.

Playing-Time Adjustments.

We have already adverted to the unfair way in which petitioner tried to give the impression that Stanley Warner engaged in routine bludgeoning of the distributors to acquiescence in the reduction of playing-time requirements (*supra* pp. 5-6). Actually, the record reflects only a minimal number of Stanley Warner playing-time adjustments—less than the number Viking received (R. 480-488).

Bidding.

The Complaint on this point is directed against Goldman (Petitioner's Brief, p. 20). Referring to Goldman's bid on COUNTRY GIRL petitioner says:

> "Although all the other exhibitors were accustomed to submitting written bids on the provided forms Goldman had never before put a Paramount bid in writing during the period of this suit."

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5. The suggestion in this footnote that Universal's offer was made "as a reward for not bringing the instant action" is simply a misstatement. Wren admitted an unqualified offer and a flat refusal (R. 500). No question of the proposed law suit came up until Wren subsequently sought a *renewal* of the offer (R. 303).

Petitioner's omission of any reference to Stanley Warner is plainly advertant, since Stanley Warner consistently *did* bid, to Paramount as well as to the other distributors (R. 80, 2462, 2520, 2547, 2568, 2572, 2617, 2669).

Petitioner at page 45 complains of "exclusion" of an offered comparison of bids made. But petitioner chose not to offer to compare itself to *Stanley Warner* in this respect—the offer was limited to Goldman (R. 1039).[6]

The Schwalberg Agreement.

Petitioner's own account of the Schwalberg Agreement in its Brief at pages 7 to 9 and 22 to 23 makes it clear enough, at the factual level, that none of the supposed advantages of the alleged arrangement was sought by or accrued to Stanley Warner. It is only in the conclusory and argumentative sections of its brief that petitioner assumes (without the slightest attempt at demonstration) that Stanley Warner was a party to the Schwalberg Agreement (pages 2, 28, 38, 46).

The only conceivable nexus between the *record* and the *assumption* of Stanley Warner participation is the reference to Stanley Warner in the Owen memorandum set out on page 8 of petitioner's brief. This memorandum, which on its face was written long after the fact by someone without personal knowledge, was not only in direct contradiction to Mr. Schwalberg's own sworn testimony on the point (R. 1833-1834), but was pure hearsay and inadmissible with respect to Stanley Warner. Petitioner's counsel originally offered the Owen memorandum only against Paramount—acknowledging its incompetence as to any other defendant (R. 1989). At the conclusion of petitioner's case he made a

6. Indeed, the offer was quite redundant since essentially the same data with respect to Goldman had already been received in evidence, again without any corresponding offer being made as to Stanley Warner (R. 192-193).

formal offer to have it admitted against Stanley Warner also (R. 2343), but never accepted the court's invitation to demonstrate by brief and argument how it had become competent as to Stanley Warner (R. 2344).

In the last analysis, references to Schwalberg are quite meaningless in relation to Stanley Warner. The very premise of the alleged understanding was a policy of *not bidding* on the part of *Goldman—Stanley Warner had no such policy and did bid*, for Paramount as well as other product.

Guarantees.

With respect to guarantees, as with respect to bids, petitioner purports to show an advantage inherent in splits, namely that they made it unnecessary to offer guarantees for pictures, and again the demonstration is a comparison with *Goldman*—ignoring the fact that Stanley Warner, also a split participant, was no better off than Viking.[7]

We are told that Viking had to offer guarantees on 14 of the pictures that it played, while on the other hand,

> "By contrast Goldman was required to offer a guarantee on only one of the 134 pictures it played." (Brief, p. 19)

There was no reference to Stanley Warner and for good reason. The record reflects numerous guarantees submitted by Stanley Warner (R. 1111, 1210, 1572, 1928, 2617).

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7. In this connection, as in the case of the other "discriminations" claimed to favor Goldman, we do not at all agree with petitioner's theory. A guarantee, for example, is but one aspect of an offer, and a firm, high percentage offer can prove more advantageous to the distributor and more expensive to the exhibitor than a fixed dollar guarantee. It seems appropriate, however, to leave argument of such points to the respondents who are directly involved.

Quality of Films.

Another of Viking's complaints has been that it did not receive a reasonable number of quality pictures.

Referring to the pictures in which Viking was interested, we find that there were 14 with national film rental of over $4,000,000. Of these *Viking* got *one*, NOT AS A STRANGER (United Artists), *Stanley Warner* got three, *one for each of its houses*, WAR AND PEACE (Paramount), MAN WITH THE GOLDEN ARM (United Artists) and GIANT (Warner). Of the six additional pictures with national film rental between $3,000,000 and $4,000,000, *Viking* got *one*, THE MAN IN THE GREY FLANNEL SUIT (Fox), and *Stanley Warner* got *one*, WRITTEN ON THE WIND (Universal). R. 28-29, 41-56, 249, 1071, 1085, 2644-2648).

In pointing up these figures, we by no means wish it to be supposed that we consider that the distributors had to give Viking exactly the same number of pictures of each quality as they gave other customers. Outside of the fact that they can not anticipate just how each picture will do, the charge here is one of a conspiracy to ruin Viking, contrary to the provisions of the Sherman Act. The antitrust laws do not require perfect equality in result. Differences follow inevitably from picture by picture licensing in a competitive market. And it would be strange indeed if differences in the grossing potential of theatres were not reflected in differences in the product they were able to license. Petitioner has now proclaimed the role of seating capacity in this respect, as well as Viking's consequent inferior "market power" (Petitioner's Brief, pp. 9, 13).

We have dealt with the subject of quality of films only in the respect in which it might be relevant to Stanley Warner's position—that is, as it relates to the pictures

which stimulated the interest of both *Stanley Warner and Viking.*

Petitioner's complaint (p. 24) about the number of good pictures Stanley Warner played,[8] includes those *which Viking chose to pass up.* Its dog in the manger approach will not bear analysis.[9]

What in the name of common sense were the distributors supposed to do with the high quality pictures that Viking did not want, which the respondent exhibitors and other exhibitors did want and for which they were willing to pay a price satisfactory to the distributors? Must the distributors bury the films in the ground until Viking wants to buy them? Or if the distributors desire to sell them to an exhibitor other than Viking, must they consult Viking, that Big Brother whose invisible, intangible presence hovers over every film released in central Philadelphia—and see whether it is satisfactory to Big Brother that the pictures be sold to some other exhibitor, and whether the terms of such sale are satisfactory to Big Brother? If the distributors didn't consult Viking, were they consequently conspirators against Viking?

The related complaint about pictures Viking did not seek (p. 25), that Stanley Warner played weaker pictures too quickly, is not only irrelevant but involves a serious distortion of the record. Petitioner sets up a national film rental of *1.5 million* as a standard of "low quality films", and refers to pictures of that caliber as "such slough product", complaining that Viking played 16. Petitioner

8. Petitioner, by the way, has somewhat overstated the number, reversing the Goldman and Stanley Warner figures offered at trial (R. 1044).

9. Trial counsel commented diffidently "—this isn't a big point, Your Honor, it is just an illustration—" (R. 1043).

then proceeds to compare its exhibition of these pictures with the Goldman Theatre's playoff of 52 pictures in 52 weeks. But the portion of the record cited shows nothing as to the quality of the Goldman pictures, and the Goldman Brief referred to shows only that the Goldman Theatre played 31 pictures of national film rent under *$1,000,000*, most of which were under *$500,000*.

Stanley Warner is then purportedly tied into all this by a reference (footnote 11) to the total number of pictures it played, with no mention of quality other than the concession that *Stanley Warner's product* was on the average *weaker* than Viking's.

As petitioner's own figures show (pp. 24-25) the average national film rent of all Stanley Warner's pictures was $750,000. That Viking should characterize pictures earning twice as much as that average as "poor quality" and "such slough" is indeed itself a dramatic demonstration that Stanley Warner often had to settle for the kind of picture Viking disdained to play. The pictures which Stanley Warner played rapidly [10] were of a caliber Viking rarely descended to at all (R. 851-856).

Film Rentals.

In a sense, all that is left of petitioner's entire case at this point is the complaint about film rental. There is no longer any real challenge as to the awards of pictures, and the complaints about adjustments, playing time, bids, guarantees, and the like are simply an attempt to give some content to the suggestion that as a result of the splits Viking "had to pay more". As we have already shown, none of the ways in which it is claimed splits

10. Actually, the figure of 97 pictures per theatre exaggerates the rate of program turnover since the weaker pictures were often double-featured (R. 851-856).

worked to cause a film rental differential [11] made sense in relation to Stanley Warner. We address ourselves, nevertheless, to petitioner's ultimate claim that Stanley Warner bought cheaper than Viking.

Viking never offered to compare the film rentals paid for the pictures in which *both Stanley Warner and Viking were interested*, and there is no claim that any discrimination existed in this context.

All that is offered, instead, is a total comparison of percentage of film rental to gross receipts on all pictures of all distributors—regardless of Viking's lack of interest in them and including not only RKO product but the product of companies which were *never* defendants (Petitioner's Brief, page 27). This kind of averaging not only ignores the great differences in films, but the fact that the competition for films was based on which exhibitor offered the most *revenue*—not the highest *percentage*.

Two examples may illustrate the fallacy of petitioner's approach:

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11. It may be noted that a differential, even if shown, would not prove adverse impact from the splits—since the natural inference would be that the splits helped respondents rather than that they hurt Viking. If a non-split market had raised Stanley Warner's film rental *without reducing Viking's*, it would not have helped Viking at all. There is no possible claim that film rental costs had anything to do with the competition for patrons, by affecting admission prices, or the like.

Syracuse Broadcasting Corporation v. Newhouse, 319 F. 2d 685 (2d Cir. 1963) was a private antitrust action by a radio station against jointly owned newspapers and a television station. The charge was that the newspaper which was owned by the same people who owned WSYR gave free advertising to WCYR. The Court directed a verdict for defendants, which was affirmed by a Court consisting of Circuit Judges, Moore, Friendly and Hayes.

On this point the court said:

> "There is nothing to indicate that requiring WCYR to pay for its advertising would in any way have aided plaintiff in competing with WSYR" (at 687).

(1) Suppose that a distributor releases two motion pictures of precisely equal first-run Philadelphia grossing potential. The Mastbaum offers a guarantee of $20,000 for one picture and the Viking offers a guarantee of $20,000 for the other picture. Each picture proves a disappointment, and consequently the percentage provisions in the contract do not come into play. The Mastbaum grosses $40,000 and the Viking grosses $30,000 (an understatement of the difference in gross that might be expected in view of petitioner's assertion of size as the relevant yardstick of market power). Then Mastbaum, paying precisely the same amount for the same item, will be paying 50% of its gross receipts in film rental, whereas Viking will be paying 66⅔%. Note that so far as the exhibitor is concerned, Mastbaum is in at least as difficult a position as Viking. If it has a larger amount left after paying film rental it will probably have less net return after paying the heavier expenses of operating the much larger theatre.

(2) Assume another pair of twin pictures played this time at the Viking and Stanton, treating the Stanton, for simplicity, as merely the equal of the Viking in grossing power (even though its seating capacity is ⅓ larger than that of the Viking). Suppose that the Stanton makes a rather simple offer of 40% of the gross receipts for one of the pictures, whereas Viking submits an offer of 90% of the gross receipts over a weekly house allowance of $5,000.[12] If the pictures play three weeks and both gross $20,000, then Viking's film rental will be 25% as compared to Stanton's 40%. If, however, the pictures gross $40,000 in three weeks, then Viking's percentage will be 50% as opposed to Stanton's 40%.

12. A type of offer frequently made by Viking (R. 635, 2411, 2429, 2432, 2435, 2443, 2500, 2521).

Obviously, in neither of the examples given was there any discrimination by the distributor or any real advantage to Stanley Warner. But the statistics which Viking offers to demonstrate discrimination in film rental or some advantage flowing from splits, do nothing to sort out these situations. Since the percentage of film rental paid is meaningful only in relation to the quality of the picture, the grossing potential and operating expense of the theatre, and the type of film rental terms in the license agreement, petitioner's lumped figures show nothing about how well Viking did—much less how the splits had any affect on it.

Petitioner's great effort at the trial of this case was to establish by circumstantial evidence a conspiracy: a dark scheme whereby Stanley Warner and 10 other defendants were working together to destroy the Viking. The primary demonstration attempted was through a claim of favoritism in bidding awards.

All that is behind us now. Here petitioner falls back on the theory that the perfectly open and fully conceded splits were unlawful *per se*. Petitioner's references to alleged discriminations are premised on the idea that they illustrate the results of the splits. But as we shall show the splits themselves were lawful and could have given rise to no injury to Viking. With this last stone removed from the foundation, petitioner's entire edifice must collapse.

ARGUMENT.

The propriety of the trial court's exclusion of certain evidence, and the correctness of the Court of Appeals' determination that the proffered data lacked probative value (R. 2790-2791), are dealt with generally in the brief of the respondent distributors, and we adopt their argument.[13] We have already shown, in dealing with the subjects to which the offered evidence was addressed, that none of it served to enhance the case against Stanley Warner, *supra*, pages 19-21, 22, 23, 25-26.

There remain for discussion by Stanley Warner, therefore, only the issues of the legality of the splits and their impact on Viking.

The Splits Did Not Constitute a Division of the Market Among Buyers or Restrain Trade Because They Excluded No One From the Market for First-Run Films.

Viking's position as set forth in its Petition for Writ of Certiorari was that

> "* * * The Philadelphia split system is nothing more nor less than a division of the market among buyers, per se illegal under an unbroken chain of Supreme Court and lower court opinions under Sections 1 and 2 of the Sherman Act." (Petition, p. 21)

This theme is pursued as follows:

> "The purpose of this system, as both Goldman and Stanley Warner freely admitted, was to eliminate competition for films among the respondent exhibitors, a

13. To avoid submitting duplicative material, we also adopt the argument of the respondent distributors with respect to the lack of evidence of damage to the Viking.

> system that rendered non-competitive 83.2% of the available seating in the Philadelphia market." (Petition, p. 23)

This position is quite different from the position taken by Viking heretofore.

In the lower court Viking had at one point acknowledged that the allegation that the split was illegal was to be treated as abandoned and no longer an issue in the case (R. 30). During the course of the trial Mr. Sawyer said:

> "I do not think that I am constrained to say your Honor that we have practically no law in the United States on this question as to, first of all, whether the split is legal or illegal per se." (R. 1574)

Viking's present argument is based on an assumption that the splits actually divided the market among the respondent exhibitors, and thereby *prevented* distributors from selling pictures to other exhibitors and *prevented* other exhibitors from buying from the distributors.

If this was what the splits did there would be much force in Viking's argument in this Court.

However, the splits did nothing of the kind. There was the evidence of both parties to the splits and of the representatives of the respondent distributors that the exhibitors never expected and the distributors never agreed that the distributors would confine the sale of their pictures to the parties to the splits. On the contrary, definitely and emphatically, all of them testified that their arrangements in no way interfered with the *freedom of the distributors to sell their pictures to any other exhibitors who offered them satisfactory terms.*

This testimony *was not contradicted* and was borne out, of course, by the fact that Viking *was not excluded* from acquiring pictures from the respondent distributors, but in fact did acquire pictures from all of them, and as we have shown, fared extremely well in the competition between Stanley Warner and Viking for the pictures which *both of them desired to buy.*

So clear is this that petitioner never explicitly contends that it was excluded by the splits from seeking any pictures the distributors had to sell.

In addition to this, the evidence is equally uncontradicted that the splits were arranged before the pictures were released and did not constitute any agreement by any distributor to license any picture on the splits to any respondent exhibitor. A split merely gave a party the *opportunity* to try to agree on terms for pictures on its side of the split, without competition from the other party.

So considered, a situation is presented to [illegible] different from the situation assumed by Viking in its denunciation of the monopoly or near-monopoly given to the parties to the splits as a result of their agreement not to compete with each other for certain pictures.

On the basis of the evidence, as distinguished from the basis of Viking's assumption, there was no restraint of trade at all as far as Viking was concerned.

On the contrary, it is self-evident that Viking was *benefited* and not injured by reason of the fact that as to the pictures it sought its only competition was *either* Stanley Warner or Goldman instead of *both* Stanley Warner *and* Goldman, as it would have been if the splits were not in existence.

There is no way in which Viking can avoid the conclusion that if the splits eliminated competition between *Stanley Warner and Goldman* to exactly the same extent they eliminated competition between *Viking* and *both Stanley Warner and Goldman*.

If, therefore, Viking had complete access to the "market among buyers" of first-run pictures, on a basis which by reason of the splits facilitated its procuring of the pictures, there is no basis for any claim that the splits injured Sley's property or business.

This matter of the necessity of showing injury to Sley as the result of the splits has been ignored completely by petitioner.

Necessity of Proving Injury to Sley by Reason of the Splits.

A reading of petitioner's Brief shows that perhaps unconsciously realizing that there was no injury to Viking as the result of the splits, petitioner treats the case as if the United States Government and not Viking was the plaintiff.

This is revealed by the fact that in its Brief under the heading "Statutes Involved" (pp. 3, 4) *petitioner does not even mention Section 4 of the Clayton Act*. That section, after all, is the sole basis for this action.

It is scarcely necessary to cite any cases for the proposition that an individual may sue for violation of the antitrust laws only if it shows injury to *its* property or business as a result of a combination or conspiracy.

The mere fact that there may be a violation of the antitrust laws of itself does not allow an action by a private individual.

The classic quotation on this point is from *Jack v. Armour & Co., et al.*, 291 F. 741 (8th Cir. 1923) at 745:

> "But before a recovery can be had by a mere private person under this section, there must at least be an allegation of the manner, nature, extent, or amount of the injury sustained by such private person. The question whether the United States could sue upon such a showing as here made is not involved and is neither important nor decisive, and the cases cited by plaintiff are not in point."

Indeed the situation is recognized frankly in Viking's Brief in the Court of Appeals as follows:

> "Admittedly, one cannot, as a mere champion of the public interest, recover damages for a violation of the antitrust laws. Clayton Act, 38 Stat. 731 (1914), 15 U. S. C. § 15 (1958); see Blaski v. Inland Steel Co., 271 F. 2d 853, 7th Cir. 1959." (p. 55)

In a weak effort to find some alleged injury to itself from the splits, Viking suggested in its Brief in the Court of Appeals that because Stanley Warner and Goldman did not compete against each other they were able to obtain pictures at lower prices, and

> "Relieved of the strain of constantly scrambling for films and financially fortified by the cheap licenses obtained when there was no competition, the defendant exhibitors could easily afford to make *premium bids on those occasions when they confronted competition.*" (p. 31) (Emphasis supplied.)

The same argument is made in this Court (Brief, p. 47, footnote 20). As expressed here the charge is that the exhibitors were able to conserve their resources while Viking was out of the market

"and then drive the price of films unreasonably high when Viking was in the market, gradually driving Viking out of business."

At the trial Viking had unlimited opportunity to show that *when it was in the market* it met "premium bids" which made the price "unreasonably high". But at the trial Viking did not even charge—much less offer evidence—that Stanley Warner or Goldman had driven up the price of film by their high bids.

Indeed, Viking's great complaint was just the opposite, that Stanley Warner and Goldman got pictures when Viking was in the market *in spite of the fact* that the Stanley Warner and Goldman offers were *not* "premium bids", but were *inferior* to those of Viking.

In the two conspicuous cases in which Viking paid too high a price for its films, neither Stanley Warner nor Goldman was in the market for those pictures and had nothing to do with the price which Viking paid.

MAN IN THE GREY FLANNEL SUIT was a Fox picture which neither Stanley Warner nor Goldman sought, and the competitor's offer, which Viking barely surpassed, came from the non-respondent Translux (R. 467-468).

In the other case, the guarantee for four Universal pictures, Viking closed the deal before the pictures ever had been offered to Stanley Warner or Goldman (R. 205-210).

Viking never has given an example of any film for which it paid an unreasonably high price because it was *driven* to do so by Stanley Warner or Goldman.

We come back to the statement that Viking has not shown how the splits harmed it in any way. They neither

excluded Viking from the market nor affected the terms on which it got films.

For the same reason the new argument that the seating power of the respondent exhibitors was a "relevant yardstick of market power" (Petitioner's Brief, p. 13) is not significant. If there was *no exclusion*, there was no *use of market power* and therefore no violation of the antitrust laws. Nevertheless, we cannot abstain from noting what a complete turnabout is represented in this imposing statement. It flies directly in the face of the testimony of Viking's main witness, Wren.

When Wren was examined in connection with his argument that Viking had just as good grossing capacity as the theatres of the respondent exhibitors or better, this is what he testified:

> "Q. You are telling me that in considering the value of a bid the number of seats that a theatre has is of absolutely no factor in the situation. Now is that your opinion?
>
> A. Definitely yes, sir." (R. 446)
>
> * * *
>
> "Q. I will transpose that question. Suppose you had a 600 seat art theatre, or any other kind, a beautiful theatre on Broadway, and Radio City with 6,000 seats made an offer. I will just take your answer for whatever it is. Are you telling me that if you were evaluating the bids between those two theatres, the difference in capacity would not have anything to do with it? Is that what you are telling us?
>
> A. I am telling you that, sir. I would go into the Music Hall for other reasons, not seats.
>
> Q. All right. But I say the seats wouldn't even be a factor, according to your opinion?
>
> A. No, sir." (R. 447)

Consistently, Wren criticized the award of BAD SEED to the Mastbaum when he had bid for the picture (incidentally, Viking guaranteed $17,500 on the picture and Stanley Warner under its bid paid $32,655, R. 259-260). Wren's testimony on this subject is as follows:

> "Q. Don't you think that with that only difference that you have mentioned, that guarantee, that a distributor is justified in believing—even if you don't agree with him—that he is better off putting this particular picture in the 4,000 seat Mastbaum instead of the 1,000 seat Viking?
>
> A. No, sir, *because the 4,000 seat Mastbaum had to be torn down because they couldn't fill the seats, sir.*" (R. 1470) (Emphasis supplied.)

Of course, Wren's testimony about seating capacity is so patently absurd that its abandonment by counsel seems perfectly reasonable. Obviously, the size of a theatre *is* important to its grossing capacity. But petitioner's current position is almost as unreasonable—at the other end of the spectrum—as the testimony it offered at trial. To say that large theatres will gross more than small theatres is not to say that the market power of the theatre, by which is meant its grossing ability, is measured as to all pictures, IBM wise, solely on the number of seats it has. And the division into "submarkets"—based on a reduction in Viking's "market power" just because it is free to seek *all* the product—does not rise above the level of nonsense by being presented in the form of a statistical chart.

The strangest result of Viking's new theory is that it shows 47.5% market control by Stanley Warner as against 22.4% by Goldman (Petitioner's Brief, p. 14). On the theory of petitioner this would mean that Stanley Warner had more than twice the market power of Goldman. No

one should be quicker to say that this was not so than petitioner, according to whom the chief villain in the play was Goldman, who originated the split arrangements. In any event, since, as we have shown, Viking was not prevented by "market power" from getting pictures to which it was entitled, these abstract theories of Viking become irrelevant and immaterial.

Private Antitrust Actions Will Survive the Dismissal of This Action.

This leaves for discussion only the final argument of Viking, which appears to be that each dissatisfied exhibitor in the United States, unable to get all the good pictures he wants at the prices he thinks proper, should constitute himself an *ad hoc* Attorney General of the United States for the prosecution of competitors, thus coming to the aid of the Attorney General in protecting the public against violation of the antitrust laws.

These laws for 25 years limited the enforcement of them to the public authorities.

When private citizens were given the right to sue for violation of the antitrust laws, their right was limited to cases in which they were *injured* by reason of such violations.

In this case Sley has not been able to point to one single act of Stanley Warner which injured him, and it would have been impossible for the lower court to have allowed this case to go to the jury without declaring that a plaintiff may recover in a private antitrust suit based on injury to him, *without proving either conspiracy or injury.*

CONCLUSION.

For all the foregoing reasons, but essentially and fundamentally because Viking's entire evidence taken as a whole failed to show not only that there was any *conspiracy* against it but also that there was any *impediment* to or *restraint* of competition *excluding* Viking from the market for first-run films and thereby causing *injury* to it, the judgment of the court below should be affirmed.

Respectfully submitted,

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